

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the matter of)	
)	
Request for Review of the Decision of the)	CC Docket No. 02-6
Universal Service Administrator by the)	CC Docket No. 96-45
Kentucky Department of Education and)	CC Docket No. 97-21
Kentucky School Districts Listed in)	
Appendix 1; Request for Waiver)	
)	

**REQUEST FOR REVIEW OF THE DECISION OF THE
UNIVERSAL SERVICE ADMINISTRATOR BY THE
KENTUCKY DEPARTMENT OF EDUCATION
AND KENTUCKY SCHOOL DISTRICTS LISTED IN APPENDIX 1;
REQUEST FOR WAIVER**

Kentucky Department of Education
Capital Plaza Tower
500 Mero Street
Frankfort, Kentucky 40601
502-564-4770

Peter D. Shields
Amy E. Worlton
Wiley Rein & Fielding, LLP
1776 K Street, N.W.
Washington, DC 20006
202-719-7000

Counsel for Kentucky Department of Education

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SUMMARY

The Kentucky Department of Education (“KDE” or “Department”), on behalf of itself and the Kentucky school districts listed in Appendix 1, hereby appeals the decision of the Universal Service Administrative Company (“USAC”) to deny funding commitments to fifty-eight Kentucky school districts in Funding Year 2003-2004 of the Schools and Libraries Universal Service Support Mechanism (“E-Rate”).

This appeal raises many factual, legal and equitable issues identical to those in KDE’s May 24, 2004 appeal to the Federal Communications Commission (“FCC” or “Commission”). Thus, in order to avoid inconsistent outcomes, KDE respectfully requests that the Commission consider this appeal together with the Department’s prior appeal of May 24.

In KDE’s particular case, the public interest, the effective implementation of the E-Rate program, and overwhelming equitable considerations require the FCC to waive its competitive bidding rules that require posting of a Form 470. KDE’s multi-year contract approach brought to fruition the policy goals of the E-Rate program, equipping every classroom in the state with Internet access – for tens of millions of dollars less than schools in other states. There is no reason to believe that Kentucky schools would fail to maintain their trackrecord of cost-effective deployment in Funding Year 2003-04.

In March 2004, the Schools and Libraries Division (“SLD”) abruptly reversed its position on KDE’s multi-year procurement approach, denying the fifty-eight applications at issue here after approving hundreds of applications based on the multi-year approach in the previous five funding years. These prior approvals made sense because requiring KDE to post Forms 470 and open its processes to competitive bidding every year would have undercut substantial efficiencies by: (a) destroying the long-term relationship that allowed vendors to offer below-market prices

to Kentucky schools; and (b) necessitating wasteful equipment substitutions, as new service providers' equipment very likely would be incompatible with Kentucky's existing infrastructure. Indeed, SLD's denials risk undercutting the efficiencies on which Kentucky's lauded, cost-effective procurement system is based.

KDE has now rebid many of its state contracts (where economically feasible) due to questions about their compliance with the E-Rate rules. Nonetheless, SLD's March 2004 rejection of KDE's multi-year approach occurred *after* the February 2003 application deadline for E-Rate funds. Kentucky school districts should not be penalized for basing their applications on demonstrably cost-effective contracts that were acceptable under SLD precedent as of the filing deadline and were only later rejected.

Accordingly, the Commission should remand to SLD the funding applications of the school districts listed in Appendix 1 with instructions to view Kentucky's multi-year contract approach as consistent with E-Rate rules in this particular case.

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UNIVERSAL SERVICE ADMINISTRATOR BY THE
KENTUCKY DEPARTMENT OF EDUCATION
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REQUEST FOR WAIVER**

Pursuant to section 54.719(c) of the rules of the Federal Communications Commission (“FCC” or “Commission”),¹ the Kentucky Department of Education (“KDE” or Department), on behalf of itself and the Kentucky school districts listed in Appendix 1, hereby appeals the decision of the Universal Service Administrative Company (“USAC”) to deny funding commitments to fifty-eight Kentucky school districts in Funding Year 2003-2004 of the Schools and Libraries Universal Service Support Mechanism (“E-Rate”).

This appeal raises many factual, legal and equitable issues identical to those in KDE’s May 24, 2004 appeal to the Federal Communications Commission (“FCC” or “Commission”).² In that appeal, the Department respectfully requested that the Commission bar USAC’s attempt to recover \$5,764,731.70 from service providers that performed services for Kentucky school

¹ 47 C.F.R. § 54.719(c).

² *Request for Review of the Decision of the Universal Service Administrator by the Kentucky Department of Education and Kentucky School Districts Listed in Appendix A; Request for Waiver*, CC Dockets Nos. 02-6, 96-45, 97-21 (May 24, 2004) (“May 24 Appeal”).

districts within the E-Rate program in 1999-2003. In both that instance and in the present case, USAC grounded its actions in the failures of KDE to open competitive bidding processes when the Department extended the same types of existing state contracts. Whereas the May 24 Appeal concerns funds recovery based on these omissions, the present appeal refers to denials of funding applications on these grounds. Accordingly, in order to avoid inconsistent outcomes, KDE respectfully requests that the Commission consider this appeal of July 20 together with the Department's prior appeal of May 24.

In Funding Commitment Decision Letters sent to Kentucky school districts (listed in Appendix 1), the Schools and Libraries Division ("SLD") of USAC explained that it denied funding because the contracts underlying the districts' applications were extended without posting a Form 470 in the year that the services were sought.³ These statewide contracts were initially entered into prior to 2003 and were voluntarily extended beyond the term of the initial contract.

As discussed below, the public interest, the effective implementation of E-Rate, and the overwhelming equitable considerations arising in this case require the FCC to waive sections 54.504(b)⁴ and remand the funding requests listed in Appendix 1 to SLD for further consideration consistent with the requested waiver. In particular, KDE respectfully requests that the Commission, with respect to:

- Group A of Appendix 1, overturn SLD's decision to deny five appeals by Kentucky school districts;

³ In the case of seven applications, the SLD stated that "no contract or legally binding agreement was in place when the Form 471 was filed." KDE has interpreted this explanation to be substantially similar to the explanation for denial offered with respect to the other fifty-one applications, that an "expiration date change indicates a voluntary extension of existing contract beyond the initial term and extension period."

⁴ 47 C.F.R. §§ 54.504(b).

- Group B of Appendix 1, consisting of thirteen appeals by Kentucky districts currently pending before SLD, order SLD to rule on these appeals consistent with any FCC order addressing this appeal, as well as any order regarding KDE’s prior appeal of May 24;⁵ and
- Group C of Appendix 1, waive the appeals deadline in section 54.720 of the Commission’s rules and consider the forty applications denied funding, which were not appealed within 60 days of a funding decision commitment letter.⁶

I. STATEMENT OF FACTS

A. **The Kentucky Education Technology System and the internal connections contracts at issue were designed as long-term relationships in order to achieve “best in class” results at the lowest available price.**

KDE’s commitment to cost-effective deployment of technology in Kentucky’s public schools predates the E-Rate program. Since 1990, KDE has helped develop and implement the Commonwealth’s plan to provide equitable access to technology for all K-12 public school students and teachers – through the Kentucky Education Technology System (“KETS”).⁷ KETS was designed to be a stable, robust, reliable, and secure network infrastructure spanning 1,400 schools in 176 districts. Today, the KETS environment supports more than 700,000 people, including 600,000 students and 125,000 teachers, school staff members, and KDE employees.⁸

⁵ Should the SLD deny any appeal in Group B while this appeal of July 20 is pending before the Commission, KDE respectfully requests that the FCC consider the underlying application with Group A.

⁶ 47 C.F.R. § 54.720. The FCC must waive the appeals deadline for Group C in order to ensure that the Commission provides consistent treatment of all 176 Kentucky school districts, whose use of the same extended, statewide contracts is at issue in this appeal and the prior May 24 Appeal. Further, if the FCC determines that the equities weigh in favor of waiving the Form 470 posting requirement, it follows that the applications of districts in Group C should not have been denied, and that these districts should not have been in a position where filing an appeal was necessary. Consequently, the equities also would weigh in favor of waiving the appeals deadline.

⁷ See Declaration of David Couch, Kentucky Department of Education Chief Information Officer (dated May 24, 2004) ¶ 3 (“Decl. of D. Couch”). KDE originally offered the Decl. of D. Couch in support of the May 24 Appeal.

⁸ See *id.* ¶ 4.

The funding applications at issue in this case sought to advance the KETS program by continuing to deploy internal connection components to provide access for every classroom.

After extensive research and testing, KETS incorporated “best in class” standards for about sixty separate pieces of internal connections equipment.⁹ KDE’s “enterprise-wide” approach in rolling out network components is unique in K-12 education. If a Kentucky public school district seeks networking equipment and software, it is *required* to purchase components that meet KETS product standards determined by the state. In addition, school districts are *required* to purchase these components from a state master contract. In return, schools benefit from extensive, expert technology planning, uniform statewide systems, management support from KDE, and below-market prices negotiated by the Commonwealth.¹⁰

The KETS master plan called for an initial competitive bidding process and annual renewals of existing contracts thereafter, an approach consistent with Kentucky procurement law.¹¹ By selecting a particular bidder’s product, KDE would select a specific “product standard.” Throughout the KETS’s multi-year implementation, all Commonwealth public schools would purchase all internal connections equipment and networking software from the selected vendors in order to meet the product standard. Maintaining relationships with specific vendors throughout the plan’s implementation was crucial to its success because:

- The prospect of a multi-year, statewide contract was necessary in order to achieve substantial volume discounts for the state’s schools; and
- Once Commonwealth schools had installed equipment as per the particular KETS product standard, the equipment of other service providers would not be easily

⁹ See *id.* ¶ 5.

¹⁰ See *id.* ¶ 2.

¹¹ See *id.* ¶ 7; Letter of December 2, 2002 from T. Kevin Flanery, Secretary, Finance and Administration Cabinet, Commonwealth of Kentucky to George McDonald, USAC Vice President (“*December 2, 2002 Letter*”).

compatible and supportable. Consequently, equipment meeting the original standard would have to be replaced. Thus, should the product standard change midstream, schools would lose their investment in technical skills associated with the original standard, as well as their investment in expensive equipment, which has an anticipated useful life measured in decades.¹²

KDE engaged in a competitive bidding process under Kentucky procurement law to identify product standards for internal connections equipment, as defined in detailed Requests for Proposals (“RFPs”). KDE received multiple bids for each of the internal connections contracts at issue in this proceeding. KDE entered into one to two year contracts with the successful vendors. The contracts provided for renewal in subsequent years if the parties agreed and if the independent Kentucky Finance and Administration Cabinet (“Cabinet”) approved the renewal as lawful and in the Commonwealth’s best interest.¹³

A contract term substantially longer than a year would have reflected the expectation of the parties concerning the duration of their relationship. KDE and its vendors had strong incentives to exercise renewal options. Kentucky schools would lose their investment in infrastructure and technical expertise if KDE switched product standards instead of renewing. Vendors would lose the benefits of a statewide, ongoing relationship if they opted not to renew. Nonetheless, KDE structured the contracts with options to renew (instead of a longer initial term)

¹² See Decl. of D. Couch, ¶¶ 6, 8.

¹³ See *id.* ¶¶ 9-11. The contracts at issue in this appeal are substantially similar to the contracts on which the May 24 Appeal is based, in that the KETS requirements, the underlying procurement process, and the form of the contracts are common to both. The Decl. of D. Couch describes the contracts associated with the May 24 appeal, which is a set somewhat different from those at issue here. Like the May 24 Appeal, this appeal is based on contracts with Cabletron Systems and General DataComm (later doing business as Ahead Communications Systems). Service providers associated with this appeal, but not the May 24 Appeal, include Enterasys, Networks, Inc., Vital Network Services, Inc., Nortel Networks Limited and Dell Inc.

because such is the Commonwealth's custom and because the parties knew that renewals were statutorily permissible under Kentucky procurement law.¹⁴

B. Kentucky leads the nation in bringing technology to the classroom at the lowest prices available.

The success of KETS in bringing technology to Kentucky schools has been widely recognized.¹⁵ KDE is proud that this success was achieved cost-effectively. Indeed, in its research over multiple years, KDE could not find any price nationwide less than that paid by Commonwealth schools for certain internal connections components.¹⁶ For example, when the online advertised price of a particular file server operating at KETS levels was \$10,781, Kentucky schools purchased this server under the state contract for \$6,340. These low prices were part of every renewed contract, including contracts for which E-Rate subsidies were sought for Funding Year 2003-04.

Two independent third parties have confirmed the competitive nature of KDE's procurement process. In 2004, the Gartner Group (a technology consultancy) confirmed that, with respect to KETS, KDE's costs are "consistently lower than those of its peers." The

¹⁴ See *id.* ¶ 12.

¹⁵ See *id.* ¶ 16. For example, Kentucky was the first state in the union to make the Internet available in every public classroom. In addition, Kentucky leads the nation in the percentage of teachers in high-minority schools whose students use computers during class (over 85%) and ranks fourth nationwide in the percent of high-poverty schools where at least half the teachers use the Internet for instruction (over 80%). The Milken Family Foundation has recognized the state's commitment to providing equal opportunity for all Kentucky students through KETS. Further, the National Center for Educational Statistics reported in 2002 that Kentucky clearly beats the national average in the percentage of schools with LAN/WAN wiring (98%), the percentage of teachers with e-mail accounts provided by the school district (99.99%), and the percentage of students with e-mail accounts provided by the school district (99.9%).

¹⁶ See *id.* ¶ 13.

organization identified the Commonwealth's enterprise-based approach to deploying technology as a "best practice" and a "cost effective investment" that saved millions of dollars.¹⁷

C. SLD repeatedly assured KDE that it complied with E-Rate rules, and SLD's reversal occurred after the Funding Year 2003-04 application deadline, when Kentucky school districts could no longer rebid.

SLD confirmed that Kentucky's internal connections contracts complied fully with E-Rate rules by funding hundreds of applications from Kentucky school districts worth millions of dollars over five E-Rate Funding Years. Each year, including in Funding Year 2003-04, KDE put SLD on notice that it had extended an existing contract by sending the extended contract to SLD.¹⁸ SLD did not give KDE any indication that its KETS internal connections contracts might raise compliance issues until Fall 2002, after all 176 Commonwealth school districts had installed millions of dollars of internal connections equipment. In response to SLD inquiries, the Department explained that rebidding the KETS internal connections contracts (including those at issue here) would have resulted in substantial waste of E-Rate dollars, as the Commonwealth had already invested \$30-40 million in KETS-compliant infrastructure manufactured by specific vendors. A new vendor's equipment would very likely not be compatible with existing infrastructure. Thus, changing vendors would necessitate replacing tens of millions of dollars of installed, functioning equipment with decades of remaining usable life.¹⁹ SLD did not reply to

¹⁷ See *id.* ¶ 14. A Milken Family Foundation echoed these conclusions in a 1999 report identifying Kentucky as a model state in the procurement of "quality, low cost, support[able] and interoper[able]" education technology. The report found that KDE's competitive bidding process, by leveraging the state's purchasing power, resulting in savings of approximately \$35 million. See *id.* ¶ 15.

¹⁸ See *id.*, ¶ 19.

¹⁹ See *id.* ¶¶ 20-21.

KDE until March 2004, over a year later, when it sent hundreds of Commitment Adjustment Letters to Kentucky school districts.²⁰

E-Rate rules required the fifty-eight Kentucky school districts listed in Appendix 1 to file their Form 471 funding applications by February 6, 2003, prior to SLD's apparent decision in March 2004 that the Commonwealth's multi-year contract system did not conform to E-Rate rules. When SLD's position became clear, the fifty-eight districts that had based their applications on the multi-year KETS contracts could not rebid and file revised applications because the application deadline had long since passed.

Denying Kentucky school districts over \$1 million in funding will impose a substantial hardship on the Commonwealth's education system and the children it serves. In addition, in light of questions raised concerning KDE's compliance with the Commission's competitive bidding rules, the Department has rebid many of its E-Rate contracts and will continue to do so. Yet, the Commonwealth cannot afford to replace its key internal connections infrastructure.²¹ Accordingly, KDE may be forced to forgo potentially millions of dollars in E-Rate discounts because the expense and waste involved in substituting a new vendor's equipment would be of an even greater magnitude.

II. THE PUBLIC INTEREST AND COMPELLING EQUITABLE CONSIDERATIONS REQUIRE THE COMMISSION TO WAIVE ITS COMPETITIVE BIDDING REQUIREMENTS IN THIS PARTICULAR CASE.

The Commission has general authority to suspend, waive, or amend its rules on its own motion for "good cause."²² "Good cause" exists to waive a Commission rule where "special

²⁰ See *id.* ¶ 22.

²¹ See *id.* ¶ 23.

²² 47 U.S.C. § 158(d)(2); 47 C.F.R. § 1.3.

circumstances” warrant a deviation from the general rule, and such a deviation would better serve the public interest than strict adherence to the general rule.²³ In deciding whether to grant a waiver, the Commission may take into account considerations of hardship, equity or more effective implementation of overall policy on an individual basis.²⁴ For example, in one E-Rate case, the Commission waived certain E-Rate rules because requiring strict compliance from the applicant district would impose an “impractical and unreasonable hardship” on the applicant.²⁵ Indeed, the Commission has an obligation to seek the public interest in particular cases.²⁶ Specifically, the courts have held that, “a regulation which is not required by statute may, in appropriate circumstances be waived and must be waived where failure to do so would amount to an abuse of discretion.”²⁷ As demonstrated below, “special circumstances” exist in KDE’s contracts that not only merit a waiver, but demand one if equity is to be served.

A. KDE has brought to fruition the public policy goals of the E-Rate program, and Kentucky school districts would continue to so serve the public interest in Funding Year 2003-04.

There is no doubt that in this case the public interest lies in waiving the Commission’s competitive bidding rules – not in punishing fifty-eight school districts for inadvertent failures to adhere strictly to such rules. Through the KETS multi-year contract system, Kentucky has been

²³ See *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *aff’d* 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied* 409 U.S. 1027.

²⁴ See, e.g., *Request for Review of the Decision of the Universal Service Administrator by Shawnee Library System*, Order, 17 FCC Rcd 11824 (2002); *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*; *Federal-State Joint Board on Universal Service*, Order, 15 FCC Rcd 7197 (1999).

²⁵ *Request for Waiver by Edcouch-Elsa Independent School District*, Order, 18 FCC Rcd 18763, 18765 (2003).

²⁶ See *WAIT*, 418 F.2d at 1157.

²⁷ *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1207 (5th Cir. 1995).

recognized as a model state for its effective implementation of the E-Rate program.²⁸ There is no reason to believe that Kentucky school districts would fail to continue this exemplary implementation of the E-Rate program's goals in Funding Year 2003-04.

Under KETS, Kentucky made the Internet available to every classroom – and did so for millions of dollars *less* than other states. The network deployment projects that the Commonwealth hopes to continue in Funding Year 2003-04 exactly fulfill Congress' purpose in creating the E-Rate program: to establish, in a “competitively neutral” way, “economically reasonable[] access to advanced telecommunications and information services” in classrooms.²⁹ There is no evidence or allegation in this case of waste, fraud or abuse, only an inadvertent error of a technical nature. Indeed, to require strict adherence under these particular circumstances would undermine the public interest and perversely *require* KDE to engage in wasteful spending of E-Rate funds.

1. The Commission must determine that the KETS contracts serve the public interest because they achieved below-market prices.

Under Commission precedent, the FCC has no choice but to find that the KETS internal connections contracts are “competitively neutral,” and moreover, that they served the public interest. The Commission has identified “the lowest possible pre-discount price” as the purpose of a “competitively neutral” bidding process.³⁰ Only six months ago, the FCC determined that

²⁸ For example, Kentucky leads or is among the top ten per cent of states in the nation with respect to a number of “technology in education” factors, including daily teacher use of computers in the classroom and student technology leadership programs. *See* Report of Governor's Task Force on K-12 Technology Funding, KETS (March 2003).

²⁹ 47 U.S.C. § 254(h)(2).

³⁰ *Federal-State Joint Board on Universal Service*, Order on Reconsideration, 12 F.C.C.R. 10095, 10098 (1997) (“*Recon Order*”).

price must be “the primary” factor in selecting a winning bidder for E-Rate services.³¹ A contract embodying a *below-market* price must satisfy the purpose of the Commission’s competitive bidding requirements, including the requirement to post a Form 470. Below-market prices that generally are *the lowest identifiable prices in the United States* are presumptively competitive. The Department was able to negotiate these rates precisely because statewide contracts with the expectation of renewal leveraged the state’s buying power.³² These low prices were carried over at each renewal, and the revised contracts were approved by the Kentucky Finance and Administration Cabinet, an agency separate from KDE.

2. Effective implementation of FCC policy in this particular case requires a waiver of the Commission’s rules.

Requiring KDE to file Forms 470 and open its ongoing projects to competitive bidding in 2003 or any other year would have undercut the ability of the state to fulfill the goals of the E-Rate program. Perversely, due to unique market dynamics emerging from the KETS approach, rebidding actually would have prevented KDE from attaining the “lowest possible pre-discount price” and moreover, would have generated a massive waste of E-Rate funds. Accordingly, in this case, the public interest requires the Commission not to adhere rigidly to Form 470 rebidding requirements.

First, annual rebidding of the KETS internal connections contracts would have eliminated the expectation of vendors that they would provide all internal connections equipment and networking software to all Kentucky public schools seeking such components over multiple years. These expectations were based on the multiyear KETS implementation schedule and the

³¹ See *Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District, El Paso, Texas*, 18 FCC Rcd 26406, ¶ 5 (2003) (“*Ysleta Order*”).

³² See Declaration of D. Couch, ¶¶ 7-8, 12, 15.

availability of renewals under Kentucky law. Without these expectations, the incentive for these vendors to offer below-market prices would have been undermined and the public interest harmed.³³

Second, it made no sense for KDE to rebid the internal connections contracts at issue in this case. The Department could not have accepted an alternative service provider's bid without generating significant, unnecessary costs. By Funding Year 2003-04, the Commonwealth had already spent more than a decade and millions of dollars installing internal connections and networking infrastructure in schools. Such infrastructure is particular to KETS standards and the proprietary technology of KDE's service providers and cannot be substituted easily with other manufacturers' systems.³⁴ Consequently, accepting another bid for Funding Year 2003-04 might easily have required the absurd step of replacing millions of dollars of internal connections equipment, notwithstanding their remaining decades of useful life.³⁵

The Commission has sanctioned the consortium approach to bidding,³⁶ yet, in this case, the economics of that approach demanded a single, initial competitive bidding process. Given KDE's success in installing technology throughout the state at the lowest available prices, and the improbability that rebidding would produce an alternative superior to renewing existing contracts, stubborn insistence that Forms 470 be posted is an irrational elevation of form over function.

³³ See Decl. of D. Couch, ¶¶ 8, 12.

³⁴ *Id.*

³⁵ See *id.* ¶¶ 5, 9.

³⁶ See *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 9027 (1997) (The FCC "encourage[d] schools...to aggregate their demand [in order to] negotiate lower rates," which Kentucky has clearly accomplished).

3. None of the adverse outcomes predicted by the Commission if Forms 470 are not posted have arisen in Kentucky's case.

The Commission has based its requirement to post a Form 470 soliciting rebids of existing contracts on the potential for waste, fraud and abuse in non-competitive procurement processes.³⁷ Yet, even SLD alleges no waste, fraud or abuse in this case; on the contrary, KDE has been a model of efficient and effective use of E-Rate funds.

None of the adverse outcomes predicted by the Commission if Forms 470 were not posted have arisen in Kentucky's eleven-year experience under the KETS contracts, and there is no reason to believe that they would arise in Funding Year 2003-04. The FCC has stated that, without a Form 470 process, "prices charged to schools and libraries may be needlessly high," and the process is "vital to limiting waste, ensuring program integrity, and assisting schools and libraries in receiving the best value for their limited funds."³⁸ The Commission emphasizes the importance of its competitive bidding requirements to "help[] ensure that schools and libraries receive the lowest possible pre-discount price."³⁹ Yet, KDE has generally attained the *lowest identifiable prices in the United States* despite contract renewals not occasioned by a Form 470. Further, two sophisticated, independent third parties identified Kentucky's procurement process as a "best practice" and a "cost effective" model for other states because it saved tens of millions of dollars.⁴⁰

³⁷ See *Ysleta Order*, ¶ 22.

³⁸ *Id.*

³⁹ *Request for Review of the Decision of the Universal Service Administrator by Roanoke Rapids Graded School District, Roanoke Rapids, North Carolina*, Order, 17 FCC Rcd 23514, 23515-16 (2002) ("*Roanoke Rapids Order*").

⁴⁰ See Decl. of D. Couch, ¶¶ 14-15.

In many cases, Forms 470 might help schools become “informed about the choices available to them” and “minimize the amount of support needed.”⁴¹ But in this case, a Kentucky blue-ribbon committee and KDE spent years researching options and developing the KETS standards, which minimized the support schools needed because the state’s systems were uniform and management lessons could be shared easily. Accordingly, the FCC’s past justifications for requiring strict adherence to its competitive bidding rules do not apply, as the public interest was not harmed through any inadvertent violation.

4. Compelling considerations of the public interest, effective policy implementation and equity require a waiver given the unique nature of the KETS internal connections contracts.

Kentucky schools might have been able to avoid an inadvertent violation of the Commission’s rules if KDE had adopted a KETS internal connections contract with a longer initial term – reaching at least to 2004. Instead, in accordance with the custom of Kentucky state government, KDE entered into one to two year contracts with options to renew, knowing that Kentucky law allowed for renewals if in the state’s best interests.⁴²

The mere structure of a contracting relationship should not be the factor on which over \$1 million in potential funding turns, especially given: (a) the great likelihood that in Funding Year 2003-04 Kentucky would continue to fulfill the purposes of the E-Rate program, which likely could not have been accomplished if KDE had rebid its contracts; and (b) the fact that no cognizable harm has arisen despite the failure of the KETS system over a decade to post Forms 470. Rigid adherence to the Form 470 process in this case would not support the public interest

⁴¹ *Roanoke Rapids Order*, ¶ 4.

⁴² *See Decl. of D. Couch*, ¶ 11.

and will impose substantial hardships on Kentucky schools. The Commission is compelled in this case to grant the requested waiver.

B. KDE and Kentucky schools have relied on SLD assurances that the multi-year contracting approach based on Kentucky procurement law complied with E-Rate competitive bidding rules.

In addition to the considerable public interest benefits delivered by waiving certain competitive rules with respect to KDE, a waiver also is appropriate because KDE's failure to comply with certain E-Rate rules also was the result of its reasonable reliance on the statements and actions of SLD throughout KDE's participation in the E-Rate program.⁴³ In its granting of E-Rate funds over five funding years, SLD repeatedly confirmed for KDE that KDE's compliance with state procurement processes was sufficient to achieve competitive outcomes under the E-Rate rules.

While KDE recognizes that it is typically the applicant's responsibility to ensure that its application is in compliance with Commission rules, the circumstances created by SLD's guidance have created anything but a typical situation. As such, the Commission should waive its competitive bidding rules with respect to Kentucky school districts' applications for Funding Year 2003-04. In its *Commitment Adjustment Waiver Order*, the Commission granted waivers of its competitive bidding and funds recovery rules for applicants that, like KDE, reasonably relied on incorrect SLD guidance and the mistaken issuance of Funding Commitment Decision Letters ("FCDLs") in Year One.⁴⁴ As noted above, SLD's incorrect guidance and treatment lasted over

⁴³ See *id.* ¶ 19.

⁴⁴ *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.; Federal-State Joint Board on Universal Service*, Order, 15 FCC Rcd 7197 (Oct. 8, 1999). (analogizing decisions of other agencies regarding recovery of funds from grant programs) (citing B-176994, *In the Matter of Chicago Association for Retarded Children; Reimbursement Under Special Food Service Program for Children*, Feb. 12, 1976, 1976 WL 8871 (C.G.) (citing occasions where the Comptroller General "agreed to permit a settlement not strictly authorized

five funding years, beginning in Year One of the program. Operating under a multi-year approach, KDE's requests for funding and investments for future years were based, in large part, on the guidance and FCDLs issued by SLD in the first year of the E-Rate program. Consequently, SLD's 1998-2003 errors were partially responsible for KDE's failure to post Forms 470 in Funding Year 2003-04. Accordingly, Kentucky school districts should be granted a waiver for that Funding Year.

In light of questions raised about the Department's compliance with the E-Rate rules, KDE has now rebid many of its contracts, where economically feasible. Yet, when SLD first affirmatively stated in March 2004 – in contravention of its long-established practice – that KDE's multi-year approach violated E-Rate rules, the deadline for applying for Funding Year 2003-04 E-Rate funds had long past. Kentucky school districts should not be penalized for basing their applications on demonstrably cost-effective contracts that were acceptable under SLD precedent as of the filing deadline and were only later rejected.

III. REQUEST FOR RELIEF

KDE respectfully requests that the Commission (a) waive sections 54.504(b) of its rules, as well as section 54.720 with respect to Group C of Appendix 1; and (b) remand to SLD the funding applications of the school districts listed in Appendix 1 with instructions to view Kentucky's multi-year contract approach as consistent with E-Rate rules in this particular case. Here, the public interest, the effective implementation of FCC policy embodied in the E-Rate program, and compelling equitable considerations require the Commission to take such action.

by . . . program regulations based on an unusual set of circumstances in which the administrative agency itself was partially responsible either for the failure to comply with the regulations or with the fact that expenses were incurred in violation of the regulations"))).

Kentucky Department of Education
Capital Plaza Tower
500 Mero Street
Frankfort, Kentucky 40601
502-564-4770

Respectfully submitted,

KENTUCKY DEPARTMENT OF EDUCATION

By:

A handwritten signature in black ink, appearing to read "Peter D. Shields", written over a horizontal line.

Peter D. Shields
Amy E. Worlton
Wiley Rein & Fielding, LLP
1776 K Street, N.W.
Washington, DC 20006
202-719-7000
202-719-7049 (fax)
pshields@wrf.com

Its Attorneys

July 20, 2004

CERTIFICATE OF SERVICE

I, Amy E. Worlton, hereby declare that copies of the foregoing motion were delivered by hand or by U.S. mail, this day, July 20, 2004, to the following:

D. Scott Barash
Vice President and General Counsel
Universal Service Administrative Company
2120 L Street, NW
Suite 600
Washington, DC 20037



Amy E. Worlton

July 20, 2004